SUPREME COURT, U.S.

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In the

Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1155~~ 64

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from
The Fifth Supreme Judicial District of Texas

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellant United Artists Corporation submits this brief in opposition to Appellee City of Dallas' Motion to Dismiss the above styled and numbered appeal and would respectfully show the following:

I.

The first question raised in United Artists' Jurisdictional Statement presents a substantial federal question concerning the First Amendment to the United States Constitution.

Appellee's Ordinance No. 11,284 undeniably authorizes restraint on speech, something which this Court has repeated-

ly held cannot be justified except under the most exigent circumstances. See, e.g., *Herndon v. Lowry*, 301 U.S. 242, 258.

The City of Dallas argues that there is no substantial federal question to be decided by this Court since the Dallas Ordinance is a classification rather than a censorship ordinance. The argument is that because there is no total suppression of speech, constitutional considerations are not involved. It seeks support for this position from dicta found in Justice Brennan's opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 195. The City argues that the language in the *Jacobellis* case is sufficient to validate the overall scheme erected by Ordinance 11,284, the substantive and procedural provisions of the Ordinance, and their application to the motion picture VIVA MARIA. In other words, because of the language in *Jacobellis*, the City of Dallas believes it has *carte blanche* to restrict and abrogate the First Amendment rights of minors, United Artists and other distributors. There is no support for this position either in the *Jacobellis* dicta quoted in Appellee's Motion to Dismiss or in any case cited by Appellee.

To the contrary, every Court, in considering ordinances or statutes which do not totally suppress speech but restrain it only partially, has recognized the inherent application of the Constitution to any consideration of the questioned enactment. Indeed, the Court of Appeals for the Fifth Circuit, in considering this very Dallas Ordinance, assumed the First Amendment protections to be applicable. 366 F. 2d 590, 597, 599.

Similarly, state courts, in considering the so-called "crime comic book" statutes, have consistently applied the First Amendment, even though the ordinances did not totally suppress material. (See *Katzev v. County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *Adams v. Hinkle*, 51 Wash. 2d 763, 322 P. 2d 844 (1958); *Police Commissioner of Baltimore v. Siegel Enterprises*, 223 Md. 110, 162 A. 2d 727 (1960) cert. denied, 364 U.S. 909; *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 201 N.E. 2d 14, 252 N.Y.S. 2d 433 (1964); *People v. Kahan*, 14 N.Y. 2d 311, 206 N.E. 2d 333, 258 N.Y.S. 2d 391 (1965)).

Appellee's reliance on *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, is likewise misplaced. Unlike the case at bar, *Prince* arose under the "free exercise" clause of the First Amendment and involved regulation of *conduct*, not speech. This Court has long recognized that the state's permissible range of regulation over conduct, even though speech may be affected indirectly, is much broader than its constitutionally permissible range of direct regulation over pure speech. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554-555. The Dallas Ordinance, by contrast, involves a direct regulation of speech.

II.

The third question raised in United Artists' Jurisdictional Statement presents a substantial federal question concerning the First and Fourteenth Amendments to the United States Constitution.

The City of Dallas, in its Motion to Dismiss, has misconstrued Appellant's argument that the Dallas Ordinance

does not provide adequate procedural safeguards as to United Artists and other distributors. The threshold question is not whether United Artists or any other distributor is aware of or has knowledge of the classification, but whether the classification can become binding as to distributors' pictures without judicial participation, as required by *Freedman v. Maryland*, 380 U.S. 51, 58, 59.

Under Section 46A.-7. (a) and (c) (p. App. A-11, A-14) an administrative classification becomes operative unless a notice of non-acceptance is filed by "any exhibitor". The distributor of the film neither receives notice of the classification nor is it permitted to file a notice of non-acceptance. Protection of a distributor's constitutional right to have its films freely exhibited cannot be delegated to an exhibitor or exhibitors, who for their own reasons may sometimes be unwilling to contest the Board's classifications. Appellee's attempt to distinguish between "distribution" and "exhibition" is fatuous. The federal courts have long recognized that a motion picture distributor has a constitutional right to have its films exhibited. See, e.g., *Corsican Productions v. Pitchess*, 338 F. 2d 441 (9th Cir. 1964).

Contrary to the City's assumption, the failure to file a notice of non-acceptance does not in any way imply "no disagreement" with the Board's proposed classification. It may indicate that in the Board's war of attrition with exhibitors, sheer human inertia will result in some unwilling acquiescence in a classification by the Board. This is the constitutional evil that *Freedman* was designed to correct.

If such a provision were deemed constitutionally permissible, the result would be far reaching. Could, for example, a Commission be established which would determine which books could not be sold to minors and, unless the bookseller or distributor filed with the Commission, within two days, a "non-acceptance" of the designation, the designation by the Commission be made automatically into a prohibition that books so designated could not be sold to minors? The enforcement of administrative designations without judicial participation has never been sanctioned by this Court. (*Bantam Books v. Sullivan*, 372 U.S. 58)

Additionally, although Appellee has gone far outside the record to state that United Artists obtained knowledge of the Board's classification of VIVA MARIA, it has not attempted to answer and it cannot challenge our conclusions that there is no provision in the Ordinance requiring that any notice be given to any distributor that exhibition of its motion picture is to be restricted, and there is a provision for that restriction in the absence of a "non-acceptance" by "any exhibitor."

III.

The fourth question raised in United Artists' Jurisdictional Statement was timely and properly raised and preserved in the courts below.

On pages 15 and 16 of its Motion to Dismiss, Appellee correctly states the Texas law—but in a vacuum—as to the

procedure required to preserve a point of error for presentation to the Supreme Court of Texas. However, the cases cited by Appellee have no application to the case at bar. The combined record in this appeal and in No. 1109 demonstrates that United Artists has contended throughout this litigation in the state courts of Texas that VIVA MARIA had been restricted even though there was no evidence that the motion picture was obscene as that term had been defined by this Court. Of course, no motion picture having any social value could be obscene under such a definition.

The Fourth question presented in United Artists' Jurisdictional Statement was clearly raised and preserved in the courts below, as follows: Point of Error Four in its Motion for Rehearing in the Court of Civil Appeals; Point of Error Two in its Application for Writ of Error to the Texas Supreme Court; Point of Error Two in its Motion for Rehearing in the Texas Supreme Court; and, Point of Error Four in its Supplemental Motion for Rehearing in the Texas Supreme Court.

IV.

The second and fourth questions in United Artists' Jurisdictional Statement have not been seriously challenged in substance.

United Artists sees no necessity of adding to its prior statements in connection therewith.

CONCLUSION

The four questions presented in United Artists' Jurisdictional Statement do raise substantial federal questions, all of which are now properly before this Court and warrant its plenary consideration.

Respectfully submitted,

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PROOF OF SERVICE

I, Dan McElroy, one of the attorneys for United Artists Corporation, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of May, 1967, I served copies of the foregoing Brief in Opposition to Motion to Dismiss on the following parties by depositing the same in the United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee City of Dallas and Appellant Interstate Circuit, Inc. at the following post office addresses, respectively:

1. To Appellee City of Dallas:

   Mr. N. Alex Bickley, City Attorney
   Room 501, Municipal Building
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2. To Appellant Interstate Circuit, Inc.:

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